

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTH SHORE AMBULANCE AND
OXYGEN SERVICE, INC.
Employer

and

Case 29-RC-185400

LOCAL 726, INTERNATIONAL UNION
OF JOURNEYMEN AND ALLIED TRADES
Petitioner

ORDER

The Employer's request for review of the Regional Director's Decision on Objections and Certification of Representative is denied as it raises no substantial issues warranting review.¹

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., May 3, 2017.

Chairman Miscimarra, dissenting:

In this case, my colleagues find that the Employer's offer of proof regarding Objection 1, which relates to a Union agent serving as an election observer, was procedurally deficient. See Board's Rules and Regulations Sec. 102.69(c)(1)(i). As this case involves the Board's final rule on representation case procedures, I reiterate my disagreement with the rule for the reasons expressed in my and former Member Johnson's dissenting views to the final rule. 79 Fed. Reg. 74308, at 74430-74460 (Dec. 15, 2014).

¹ We agree that the Regional Director properly overruled the Employer's Objection 1 without a hearing based on the Employer's deficient offer of proof. Secs. 102.69(a) and 102.69(c)(1)(i) of the Board's Rules and Regulations; *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992). In any event, Objection 1 does not warrant setting aside the election because, as the Regional Director correctly observed, the mere service of a nonemployee union official as an election observer is not objectionable misconduct. *Longwood Security Services, Inc.*, 364 NLRB No. 50 (2016).

As I explained in the dissenting views set forth in the Board's Election Rule, I believe an offer of proof "is an informal short-form description of potential evidence," *id.* at 74446, which should "specifically identify[] witnesses who w[ill] provide direct rather than hearsay testimony to support its objections, specifying which witnesses w[ill] address which objections." *Transcare New York, Inc.*, 355 NLRB 326, 327 (2010). I also believe, however, that where a party's objection presents uncontroverted facts, it is improper for the Board to refuse to pass on the merits of the objection merely because it is unaccompanied by an offer of proof.

In Objection 1, the Employer states that "[a]t the Election, the NLRB Board Agent permitted a Business Agent of [the Union], who is not an employee of [the Employer] to serve as the Union's observer." The Union does not dispute their Business Agent's presence at the election. The Employer's Request for Review provides supplemental information on the uncontroverted presence of the Union agent observer. Specifically, the Request for Review asserts that, prior to the election, the Union stated that it would designate an employee of the Employer to serve as its observer, but then shortly before the election was scheduled to commence, the Union's Business Agent advised the Board Agent that he could not find an employee who was willing to serve as an observer. As a result, the Business Agent requested and was granted permission to serve as the Union's election observer. While these specifics were not submitted to the Regional Director prior to her decision, they merely serve to corroborate the uncontroverted fact the Regional Director considered in making her decision. By denying review here, on the procedural ground that the Employer has failed to provide an offer of proof, the Board disregards the fact that it has before it all of the relevant Objection 1 information that was known to the Regional Director and to the Board agent conducting the election. It is important for the Board's resolution of election issues to turn on relevant facts and the proper application of legal principles, placing substance over form. By insisting on strict adherence to technical procedures, the majority jeopardizes the integrity of the Board's election process. See *Global Contact Services, Inc.*, Case 29-RC-134071 (2015) (not reported in Board volumes) (Member Miscimarra "believes the Board should avoid an unduly restrictive reading of timely relevant objections ... given the ... Board's responsibility to assure employees the 'fullest freedom' in their exercise of protected rights in Board-conducted elections (Sec. 9(b))").

Turning to the substance of Objection 1, the Board's denial of the Employer's Request for Review here is consistent with the majority position asserted in *Longwood Security Services, Inc.*, 364 NLRB No. 50, slip op. at 2 (2016) ("[A]bsent evidence of misconduct, service by a union official as an observer is not grounds to set aside a representation election"). I disagree with *Longwood*, however, for the reasons articulated in my dissenting opinion therein. *Id.*, slip op. at 5-8 (Member Miscimarra, dissenting). Here, I reassert my dissent in *Longwood*, specifically emphasizing that "the mere presence of *a[ny]* party's agents in a place employees must pass in order to vote constitutes objectionable conduct sufficient to set aside an election." *Id.*, slip op. at 6 (citing cases). There are few actions more coercive and impairing of free choice than a union agent positioning him or herself *in the polling place* as a *Board-approved observer*, closely monitoring every single voter mere seconds before he or she marks and casts a ballot. *Id.* See also *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 993 (D.C. Cir. 2001) (Board precedent "stand[s] for the proposition that a *party*"—not just an *employer* party—"engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote") (emphasis added). In an attempt to

further the goal of ensuring free and fair elections, I would find that the Union Business Agent's presence as an observer in this election constitutes objectionable conduct sufficient to set aside the election.

Accordingly, I respectfully dissent.

PHILIP A. MISCIMARRA, CHAIRMAN